IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

IN THE MATTER OF THE	)	
CARE AND TREATMENT OF	)	
MICHAEL G. NORTON,	)	No. ED 81854
	)	
Appellant.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF CLARK COUNTY, MISSOURI
FIRST JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE KARL DeMARCE, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

Emmett D. Queener, MOBar #30603
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594

INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

JURISDICTIONAL STATEMENT

Michael Norton appeals the judgment of the Honorable Karl DeMarce in the Clark County, Missouri, probate court committing him to secure confinement in the Department of Mental Health as a sexually violent predator. To the extent that this appeal does not involve any issue reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, jurisdiction lies in the Eastern District Court of Appeals, Article V, Section 3, Missouri Constitution (as amended 1982); Section 477.050, RSMo 2000. To the extent that any issue raised in this brief raises a colorable issue of the validity of a statute, jurisdiction lies in the Missouri Supreme Court; and Mr. Norton requests transfer to that Court.

STATEMENT OF FACTS

Michael Norton pleaded guilty on October 11, 1996, to child molestation and sentenced to five years in prison (L.F. 21).[1] Mr. Norton was scheduled for release from prison on May 18, 2001 (L.F. 25). An End of Confinement report prepared on March 28, 2001, concluded that Mr. Norton might meet the definition of a sexually violent predator (L.F. 25, 33). The State filed a petition on May 3, 2001, to confine Mr. Norton in a secure facility of the Department of Mental Health pursuant to Section 632.480 *et seq.* (L.F. 20-23). The probate court found probable cause to believe that Mr. Norton might be an SVP, and ordered an evaluation (L.F. 5).

Dr. John Rabun, a psychiatrist with the Department of Mental Health, was assigned to the evaluation, and he concluded that Mr. Norton did not suffer a mental abnormality making him an SVP under the statute (L.F. 201). The State retained Dr. Harry Hoberman, a psychiatrist from Minnesota, to perform a second evaluation (L.F. 201, Tr. 477, 479). Dr. Hoberman had been retained by the State of Missouri to perform nine SVP evaluations, finding that the person fit the definition of the statute in seven of those cases (Tr. 553). In addition to testifying against Mr. Norton, Dr. Hoberman was to testify for the State in three other pending trials (Tr. 555). He had been retained three times by defense attorneys in Iowa to evaluate committed persons for release, and each time opined that the person was not ready for release (Tr. 556). Dr. Hoberman has never offered an

opinion favorable to a committed person (Tr. 553). The probate court granted the State's motion on November 14, 2001, for a second evaluation by Dr. Hoberman, over Mr. Norton's objection (L.F. 8-9, 200-202, 203-205, 206).

On March 4, 2002, Mr. Norton's trial was set for June 24, 2002 (L.F. 11). Dr. Hoberman prepared a thirty-four page report on May 14, 2002 (L.F.284-317). He used two actuarials "developed to quantify the risk of sexual recidivism in recent years," the Static-99 and MnSOST-R (L.F. 314). Mr. Norton's score on the Static-99 is "associated with a medium-high rate of recidivism." (L.F. 314). Mr. Norton's score on the MnSOST-R is "associated with a relatively low rate of sex offense recidivism…." (L.F. 314). Dr. Hoberman stated in his report that "[s]till another method for assessing risk for sex offender recidivism is the use of structured clinical ratings." (L.F. 314). He noted that he scored Mr. Norton on the Risk for Sexual Violence Protocol (RSVP), a structured clinical risk assessment tool of twenty variables (L.F. 315). Dr. Hoberman interpreted Mr. Norton's score on the RSVP to indicate a high likelihood of recidivism (L.F. 315).

Mr. Norton filed a motion for a ***Frye*** hearing on the general acceptance in the scientific community of the RSVP to determine its admissibility into evidence (L.F. 299-261). The probate court granted Mr. Norton's motion because the RSVP is a new protocol (Tr. 21). In order to avoid the ***Frye*** hearing, the State had Dr. Hoberman prepare an addendum to his report on June 13, 2002, to "score" Mr. Norton as "at least a moderate likelihood" to reoffend according to the Sexual

[1] The record on appeal consists of a legal file (L.F.) and trial transcript (Tr.).

Violence Rating Scale (SVR-20) (L.F. 321, Tr. 11). The "20" in the title refers to the twenty variables on this structured clinical assessment tool (L.F. 321). The State advised Mr. Norton of this change on June 18, 2002 (Tr. 4). Mr. Norton filed a motion on June 21, 2002, to exclude the evidence or for a ***Frye*** hearing on admissibility of the SVR-20 (L.F. 281-283). The probate court heard this motion on the morning of trial (Tr. 2). Mr. Norton advised the court that the SVR-20 had been excluded under the ***Frye*** standard in the Florida case of ***In re the Commitment of Roberto Valdez*** (Tr. 7-8). Dr. Doren had testified in that case that the SVR-20 was not used by any expert in any state (Tr. 7-8). Mr. Norton also advised the court that he had an expert, Dr. Louis Rozell, who would testify that the SVR-20 was not generally accepted in the scientific community (Tr. 9).

The State replied that it had asked Dr. Rabun in a deposition whether the individual factors of the SVR-20 were generally accepted in the scientific community, and Dr. Rabun answered that the factors were generally accepted to assess risk (Tr. 13). The State therefore suggested that it would inquire of Dr. Hoberman regarding the factors without referring to the protocol by name or to the "score" the doctor gave to Mr. Norton's responses (Tr. 13, 15). The probate court denied a ***Frye*** hearing if the State was not going to refer specifically to the SVR-20 protocol, and indicated that it would allow Mr. Norton to call Dr. Rozell as a witness to rebut Dr. Hoberman's testimony if necessary (Tr. 21-23).

Twelve year old Chandra Sinks told the jurors about the contact that led to Mr. Norton's conviction (Tr. 292). She, her mother, brother and sister went to Mr.

Norton's house to go fishing when she was six years old (Tr. 293). Chandra had never met Mr. Norton before (Tr. 294). She, her family, Mr. Norton and two other boys slept on the living room floor that night (Tr. 295). Chandra said that she woke up to find Mr. Norton putting his finger in her privates (Tr. 296). She said that he tried to make her touch his penis (Tr. 296). When Chandra got up to tell her mother, Mr. Norton told her not to get up and that everything was O.K. (Tr. 296). Chandra nonetheless told her mother and was taken to the police station (Tr. 296).

Mr. Norton married Barbara Womack in 1983 (Tr. 274). Her son Richard told the jurors that Mr. Norton engaged in sexual acts with him (Tr. 272, 274). He said that Mr. Norton touched his penis maybe a dozen times, and made Richard put his mouth on Mr. Norton's penis a couple of times (Tr. 275-276). Richard was about fourteen years old (Tr. 273). He made these allegations to a counselor in 1984 or 1985, after he had moved out of the house and was living with his father (Tr. 276-277). The counselor told his father and step-mother, who in turn told his mother of the allegations (Tr. 277). Richard could not remember the Division of Family Services conducting any investigation into his allegations (Tr. 277).

Richard's younger sister, Becky, told was seven and eight years old in 1984 and 1985 (Tr. 286, 288). She told the jurors that Mr. Norton put his fingers in her genitals and made her touch his penis in different places throughout the house (Tr. 289-290). Becky recalled this happening the whole time Mr. Norton and her mother were married (Tr. 290). She testified that Mr. Norton told her not to tell,

and that no one would believe her because she was the child and he was the adult (Tr. 290-291). She said that she never told anyone of the abuse (Tr. 291).

The youngest sibling, Bonnie, told the jurors that when she was six or seven years old Mr. Norton made her touch his penis with her hand and her mouth while in a shed (Tr. 279-280, 282). She said that she could recall another time when she had to do the same things while sitting on a freezer (Tr. 282). Bonnie testified at a deposition that it happened more times but she had blocked out the specific memories of them (Tr. 283). She told the jurors that Mr. Norton said that it was a secret and no one else needed to know (Tr. 282). She said that she told her mother about the abuse and her mother left Mr. Norton (Tr. 284). Bonnie began counseling regarding the abuse about two and a half years before the SVP trial (Tr. 284).

Rebecca Woody observed Mr. Norton for about 120 days in the Sexual Offender Assessment Unit when he was first incarcerated (Tr. 303, 307). She observed him in group three to five times a week, reviewed his "homework," conducted individual interviews and psychological testing (Tr. 307, 311-314). Ms. Woody testified that she understood that two victims were involved in the crime for which Mr. Norton was incarcerated, but that he denied any contact with the eight year old girl, admitting only that he touched the six year old (Tr. 316-317). Mr. Norton said that he had no memory of the contact, something Ms. Woody found significant for risk (Tr. 316-317). She noted Mr. Norton's statements regarding his marriage, and regarding a more recent nine year relationship with a

woman named Carrie, whom he referred to as "Little Girl." (Tr. 317-319). Ms. Woody also testified that Mr. Norton referred to the six year old victim as "Little Lady," and described her as about the same size as Carrie (Tr. 320, 322). She thought the "Little Lady" nickname was significant because offenders will sometimes make the child into an adult in their own mind to justify what they have done (Tr. 321).

Ms. Woody testified that Mr. Norton participated in group sessions and demonstrated the ability to give the "right" answers, but she believed that Mr. Norton did not understand what it meant for his behavior or how to change his behavior (Tr. 322). Mr. Norton kept the required journal in which he focused on important matters, but again Ms. Woody thought that he was not internalizing the instruction, nor did he understand the seriousness of his crime or his need to change (Tr. 324). She testified that she stays current with research on risk assessment, which was relatively new when she was in the Sexual Offender Assessment Unit (Tr. 325-326). Ms. Woody concluded that Mr. Norton was in denial about his conduct in the crime he pleaded guilty to, and about other allegations of sexual abuse alleged against him reported in the pre-sentence investigation (Tr. 326-327). She considered denial a risk factor (Tr. 327). Ms. Woody also considered the denial to demonstrate low motivation for change and refusal to accept responsibility (Tr. 327). Her assessment of Mr. Norton was that he had a high risk to reoffend (Tr. 328-329).

In the six years since Ms. Woody assessed Mr. Norton, doctors Karl Hanson and Monique Bussiere compiled an analysis of all studies done on sexual recidivism (Tr. 331-332, 334-335). This meta-analysis compared and matched the results of the other studies (Tr. 332). The Hanson and Bussiere analysis indicates that lack of amenability to treatment, a factor Ms. Woody said increased Mr. Norton's risk, was not relevant to risk of reoffense (Tr. 334-335). The meta-analysis also found that denial, another risk factor identified by Ms. Woody, was not a major risk factor (Tr. 336). Ms. Woody acknowledged that Mr. Norton's I.Q. of 83 was in the low-average range (Tr. 341). She said that while Mr. Norton did the work in the program and could repeat what he was told, it seemed like it really did not "sink in" (Tr. 341-342). Ms. Woody acknowledged that this could be the result of low-average I.Q. (Tr. 342).

The Missouri Sexual Offender Program (MOSOP) is a mandated program for anyone incarcerated for a sexual offense (Tr. 353). The program has two phases (Tr. 354). The two-week phase 1 assesses the person's intellectual capacity, motivation, and ability to understand the 15 principles of responsibility therapy (Tr. 356-357). Mr. Norton successfully completed this phase (Tr. 364).

Phase 2 involves therapists and is where the person demonstrates application of the phase 1 principles to prevent re-offense (Tr. 356). This phase generally lasts nine to twelve months (Tr. 370). The first step in phase 2 is to keep a daily journal of "thinking errors" in everyday events that are then discussed by the group according to the principles taught in phase 1 (Tr. 365-368). The second

step is to do a detailed case report of the offense for which the person is incarcerated and the days or weeks leading up to it so the person can identify the "thinking errors" that gave rise to the crime (Tr. 369). This allows the person to understand what happened and how to prevent it in the future (Tr. 369). The next step is the empathy stage because if the person has empathy for the victim and realizes the harm he has caused he is less likely to do it again (Tr. 370). The final step is preparation of a relapse prevention plan to put coping skills and strategies in place to break the offense cycle (Tr. 370).

Mr. Norton began phase 2 in November of 1997 in a group led by Sally Kelley (Tr. 371-372). That group was split up in August of 1998 and Mr. Norton was put in Laura Knoll's group (Tr. 351-352, 393). While there is a constant turn-over in groups, being placed in a new group can affect some people (Tr. 393). Ms. Knoll terminated Mr. Norton from the program in November of 1998, citing his failure to retain the 15 phase 1 principles (Tr. 374). She said that Mr. Norton was given a principles test twice and scored "zero" each time (Tr. 374, 377, 409). She also suggested at trial that Mr. Norton's anger and excuses in her group were frustrating the other members of the group (Tr. 376-377). Ms. Knoll said that Mr. Norton made poor progress correcting thinking errors: anger, defensiveness, justification, and minimization (Tr. 382-383). She suggested that Mr. Norton "failed" the case report step by leaving out relevant details (Tr. 383). Because he "failed" the case report, he also "failed" the empathy portion (Tr. 383).

The therapists prepare "participation profiles" of group members on a regular basis (Tr. 394). Ms. Knoll's final profile before Mr. Norton was terminated from the program described Mr. Norton's promptness as satisfactory, his cooperation as fair, and his attentiveness, interest, verbalization, appropriateness of responses, enthusiasm, affect on group, concept understanding, and concept application as poor (Tr. 417). Only a month before Ms. Knoll described Mr. Norton's participation on each factor as good, satisfactory, or fair, with no poor ratings (Tr. 395-396). Ms. Taylor's final report described Mr. Norton's participation as good, satisfactory, or fair, with no poor ratings (Tr. 398-399). Of the reports by Ms. Taylor identified at trial, she described as poor his participation for only three factors in June of 1998 and for only two factors in April of 1998 (Tr. 400-403).

Ms. Knoll, a clinical psychologist, used the DSM-IV to diagnose Mr. Norton with pedophilia (Tr. 351-352, 378, 384). She reached this diagnosis by finding two victims of the charged offense and allegations of other incidents over a period of years (Tr. 385). She stated that Mr. Norton posed a high risk of re-offense because multiple victims, male victims, and unsuccessful treatment correspond with high risk (Tr. 387).

Linda Kelley prepared the End of Confinement report before Mr. Norton's anticipated release from prison (Tr. 427-428). An EOC report is done on each inmate with an index offense who "fails" MOSOP (Tr. 429-431). She asked Mr. Norton about the offense for which he was convicted (Tr. 438-439). He told her

that he did not know the girl, he had only met her that day, and it was just an opportunity he acted on (Tr. 439). He also said that friends told him to get the little ones because they will not tell (Tr. 439). Ms. Kelley asked about the eight-year old, and Mr. Norton denied that he molested her (Tr. 440). She asked Mr. Norton if there were other "victims," and he suggested that he had sexual relations with a fifteen year old and a sixteen year old, but they had been the aggressors (Tr. 441-442). Mr. Norton had worked at carnivals and it was common to see young children lured and molested by carnival people (Tr. 445-446). He also suggested that he had been at a strip club once on "virgin night" where some twelve year old girls were brought in and were raped by customers (Tr. 447). Ms. Kelley asked if these were things he had seen and fantasized about, and Mr. Norton said yes (Tr. 448-449).

Dr. Hoberman testified to his belief that Mr. Norton is a sexually violent predator defined by Missouri law (Tr. 501). He diagnosed Mr. Norton with two mental abnormalities; pedophilia and mixed personality disorder (Tr. 502). The diagnosis of pedophilia rested on Mr. Norton's conviction, the allegations of other children that he molested them, Mr. Norton's report that he had sex with a fifteen year old when he was nineteen and with a sixteen year old when he was twenty-six, his statements in DOC records that he molested five to fifteen children, his reported "rape fantasies" involving twelve year old girls, and his statements that he cannot be around children because he might offend against them (Tr. 503-507). Dr. Hoberman considered allegations against Mr. Norton even without a charge or

conviction because he believed that was the common practice in the field (Tr. 509-510).

Dr. Hoberman said that pedophilia was a mental abnormality under the statute because it predisposes the person to commit sexually violent offenses (Tr. 513-514). If a person is aroused by children the person will seek them out (Tr. 513-514). A person not aroused by children will not seek them out (Tr. 514).

Dr. Hoberman said that Mr. Norton demonstrated difficulty controlling his behavior (Tr. 514). Mr. Norton took advantage of the opportunity to molest Chandra (Tr. 515). Dr. Hoberman said that Mr. Norton reported that he had sex with the fifteen year old because no one would know and his male hormones kicked in (Tr. 515). Mr. Norton allegedly reported that he had sex with the sixteen year old because he wanted to (Tr. 515-516). Dr. Hoberman also found evidence of Mr. Norton's difficulty controlling his behavior from allegations made by Becky Womack that he would molest her while other people were around (Tr. 517). Dr. Hoberman also relied on Ms. Woody's conclusion that Mr. Norton acts on impulse (Tr. 516-517).

Dr. Hoberman advised the jurors of his opinion that Mr. Norton "has the characteristics of a person who is more likely than not to sexually re-offend," to engage in predatory acts of sexual violence if not confined in a secure facility (Tr. 518). This opinion was based on a number of things (Tr. 518-519). Dr. Hoberman based his opinion on that of the DOC employees who concluded in the Sexual Offender Unit, MOSOP, and End of Confinement reports that Mr. Norton

was at high risk to re-offend (Tr. 519). Dr. Hoberman pointed out that everyone except Dr. Rabun has said that Mr. Norton is more likely than not to re-offend (Tr. 519).

Dr. Hoberman also turned to research literature regarding risk assessment (Tr. 520). He informed the jurors that he started with a "base rate" for recidivism by child molesters of 52% as expressed in a Massachusetts study following offenders for up to twenty-five years (Tr. 522, 558, 560). He then looked for things that make a person's risk higher or lower than the base rate (Tr. 523). Dr. Hoberman identified the diagnosis of pedophilia as a factor increasing Mr. Norton's risk of re-offense, suggesting that not all child molesters are pedophiles (Tr. 523). Another factor he identified as higher risk was the number of alleged victims, the number of alleged incidents, and an alleged male victim (Tr. 523-525). Dr. Hoberman suggested that Mr. Norton's denial and minimization was an increased risk factor (Tr. 525). So too, the alleged twenty year history of abusing children (Tr. 526-527). Dr. Hoberman suggested as a "key factor" for risk above the base rate was failure in treatment programs (Tr. 527-528). Other increased risk factors identified by Dr. Hoberman included use of verbal or psychological force, lack of self-awareness, impulsivity, relationship problems, and Mr. Norton's "confusing" employment history (Tr. 528-530, 534). These conclusions formed the basis of Dr. Hoberman's opinion that "Mr. Norton is a person who has the characteristics of someone as described by the Missouri statute." (Tr. 535).

Dr. Hoberman acknowledged that he used the MnSOST-R and Static-99 actuarials because they are generally accepted tools for assessing risk of re-offense (Tr. 542, 544). Mr. Norton scored at low risk on the MnSOST-R and at low-moderate risk on the Static-99 (Tr. 546-549). The doctor also acknowledged that the introduction to the DSM-IV cautions that a particular diagnosis "does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder." (Tr. 548-549).

Dr. Hoberman was aware of the Hanson and Bussiere meta-analysis, and acknowledged that by reviewing over 23,000 subjects it was the largest study of its kind (Tr. 558-559). The meta-analysis established a base rate for re-offense of 12% (Tr. 558). But Dr. Hoberman discounted that figure by suggesting that the study only followed subjects for four or five years (Tr. 559). Dr. Hoberman acknowledged a 1988 study that established a re-offense base rate of 43%, but again discounted that figure because it did not have the twenty-five year follow-up (Tr. 564-565). He acknowledged that a 1999 study established a 17.6% base rate for re-offense (Tr. 565). But he again discounted that number in favor of the 52% base rate because "the length of time they were followed" in that study (Tr. 565-566). Dr. Hoberman's testimony suggests why he chooses the longer study:

> my opinion is that [Mr. Norton] is a person who has the characteristics of someone who is more likely than not to sexually re-offend in the indefinite future, because according to the issue of civil commitment, it's not specific to a number of years, it's about the open-ended future. And

so, what we know, that 52 percent is, for example, only up to 25 years, when Mr. Norton is not an old person at this point in time, and so it may be that he may live for more than 25 years. We only have data about 25 years, and the civil commitment statutes for sexual predators ask what's the chance of – is this person more likely than not to commit sexual offenses, not even be arrested for it or convicted of it, but commit some sex offense in the future, is it more likely than not, and it's my opinion that in Mr. Norton's case he is more likely than not to – to commit such an offense.

(Tr. 588).

Dr. Hoberman considered Mr. Norton's statements that after his release he would not be around children to be a factor increasing his risk to re-offend (Tr. 569). He viewed the statements to be recognition by Mr. Norton that being around children is a bad thing for him (Tr. 569). The doctor agreed that offenders are taught in treatment not to put themselves in situations that can present problems for them (Tr. 570). Asked how he could then consider Mr. Norton's intention to stay away from children could be a factor increasing his risk to re-offend, Dr. Hoberman answered, "Well, I think it can be understood in both forms." (Tr. 571-572).

Dr. Hoberman acknowledged that if Mr. Norton had a job lined up that would be a factor reducing his risk to re-offend (Tr. 574). Mr. Norton had a place to live that did not include children, and that reduced his risk (Tr. 575). Mr. Norton also told Dr. Hoberman that he intended to participate in sex offender

counseling in Kirksville after his release from prison (Tr. 575-576). Dr. Hoberman acknowledged that the meta-analysis indicated that the type of sexual contact, a factor he claimed increased risk, has little correlation to re-offense (Tr. 577-578). The same was true for another factor he considered; Mr. Norton's denial of all but the one offense (Tr. 578).

Mr. Norton had a place to live after his release from prison (Tr. 606-607). Helen Miller had known Mr. Norton since he was a boy (Tr. 607). She lived on a large farm in Gorin, Missouri, and everyone in that small town knew one another, and knew what Mr. Norton had pleaded guilty to (Tr. 607). Ms. Miller had kept in contact with Mr. Norton after his conviction (Tr. 607). No children lived near Ms. Miller (Tr. 608-609). Ms. Miller's own children and her grandchildren were all adults (Tr. 609). She had great-grandchildren, but they seldom came to the house (Tr. 609). If Mr. Norton came to live with her, she would see to it that he was not around in the event the great-grandchildren visited (Tr. 610).

Donald Miller, Ms. Miller's son, operated the four family farms (Tr. 616-617). He, too, had known Mr. Norton for a long time, and Mr. Norton had worked on the farms for Mr. Miller in the past (Tr. 616-617). Mr. Miller told the jurors that if Mr. Norton was released he could work on the Miller's farms (Tr. 617). He also told the jurors that his grandchildren were not around very much, and if they were the Millers could see that Mr. Norton had no contact with them (Tr. 618-619). The State asked Mr. Miller if he and his mother could "control" where Mr. Norton went, and Mr. Miller said they could (Tr. 620). He added that the court

might have some say about what Mr. Norton could do if he came to live on the farm (Tr. 621-622). The State asked if Mr. Miller's opinion would change "if you knew that – that this Court's not going to have any say if he – if, in fact, he gets out?" (Tr. 622). Mr. Miller replied, "I think if he served – he served his time for what he supposedly done, well, I think he ought to have a fair shot at getting on with his life." (Tr. 623).

Dr. Rabun informed the jurors that DMH is involved in all SVP evaluations by court order (Tr. 662, 665-666). He uses actuarials as a guide or "anchor" for risk assessment, but then estimates risk up or down based on factors unique to the person (Tr. 670). Mr. Norton scored medium to low risk on the Static-99 and low risk on the MnSOST-R (Tr. 671-673). His MnSOST-R score was similar to persons who re-offended at a rate of 29% over eight years (Tr. 674).

Dr. Rabun told the jurors that Mr. Norton's family and behavioral history was important to show low risk of re-offense (Tr. 680-681). While Mr. Norton has had several jobs, he was generally employed (Tr. 682-683). Mr. Norton had no drug history, and had stopped drinking even before he was incarcerated (Tr. 648-648). Mr. Norton had only the one conviction (Tr. 685).

While Dr. Rabun could not say that Mr. Norton had "successfully" completed MOSOP, he did believe that Mr. Norton learned from his time in treatment (Tr. 689, 734). Mr. Norton described the need for him to stay away from children (Tr. 689, 691). Avoidance of high risk situations in part of the

training (Tr. 689). Dr. Rabun described Mr. Norton's intention not to put himself in high risk situations as "quite positive" (Tr. 690-691).

Dr. Rabun's "diagnosis" was not really a diagnosis, but a label to focus treatment (Tr. 692). Dr. Rabun identified Mr. Norton's situation as "sexual abuse of a child," but he did not diagnose pedophilia (Tr. 692-693). Diagnosing pedophilia requires reoccurrence over at least a six-month period, and Mr. Norton had only the single offense for which he was charged and convicted (Tr. 694). Dr. Rabun was not unaware of the allegations made by the step-children, but he did not consider those allegations to diagnose pedophilia (Tr. 694-695). The doctor's own personal ethics will not allow him to consider mere allegations when such a substantial liberty interest is at stake (Tr. 695). Dr. Rabun would have considered those allegations if Mr. Norton had admitted them, but he had denied them (Tr. 695-696). The doctor noted that the local prosecutor did not act on the allegations, and Dr. Rabun would not put himself in the position of having to decide whether Mr. Norton or the step-children was telling the truth (Tr. 696). Dr. Rabun advised the jurors that because the civil commitment process can lead to a "significant deprivation of liberty … I don't use uncharged, denied bad acts in this kind of setting." (Tr. 698). All of the doctors at DMH rely only on admissions, charges, or convictions, and not denied allegations (Tr. 705, 717). Dr. Rabun acknowledged studies that indicate an evaluator should rely on collateral sources of information, not just self-reporting (Tr. 706-707). But he pointed out that was different from trying to decide who is telling the truth whether an incident occurred (Tr. 707).

Dr. Rabun informed the jurors of his opinion that Mr. Norton was not more likely than not to engage in predatory acts of sexual violence because without a mental abnormality predisposing a person to commit sexually violent offenses the evaluator never reaches that question (Tr. 700-701).

Dr. Rabun also testified that defense counsel informed him that Mr. Norton had arranged for out-patient sex offender treatment, but Dr. Rabun did not know what program was contemplated (Tr. 739-740, 741). The State asked Dr. Rabun who would see to it that Mr. Norton attended that treatment "if he left here today?" (Tr. 740). The doctor replied that would be between Mr. Norton and his therapist (Tr. 740). The State continued: "But there would be nobody, there would be no supervision from anybody to make him go to treatment?" (Tr. 740). Dr. Rabun answered that was true if Mr. Norton was not committed (Tr. 740).

The State told the jurors in closing argument that it only had to prove the four items identified in the verdict director, not anything else that came out during the trial (Tr. 786). The State specifically told the jurors that "[t]here was an issue about whether [Mr. Norton is] going to go to treatment later, supposedly." (Tr. 786). The State said that it did not have to prove whether Mr. Norton will or will not go for treatment (Tr. 786). The jurors were instructed, however, that if they found Mr. Norton to be a sexually violent predator he would be committed to the custody of the director of the department of mental health for "control, care and treatment" until his condition had so changed that he was safe to be at large (L.F. 333). The State argued that it had proven that Mr. Norton would re-offend if not

in a secure facility because they "knew" he had molested four children, and he had serious difficulty controlling his behavior because he molested Chandra while her mother and other children were present (Tr. 787, 789). The State also argued that it did not have to prove that Mr. Norton would re-offend; only that it was more likely than not that he would re-offend (Tr. 792).

The jurors found that Mr. Norton should be committed to the Department of Mental Health for control, care, and treatment as a sexually violent predatory (L.F. 334, Tr. 820). After the verdict, Mr. Norton objected to formal entry of judgment without consideration of less restrictive alternatives to secure confinement (Tr. 823-824). The State replied that there was no statutory provision for less than secure confinement (Tr. 824). The probate court overruled Mr. Norton's objection and entered a judgment committing him to secure confinement in the custody of DMH (L.F. 19, Tr.824). Mr. Norton filed a motion for judgment not withstanding the verdict, or a new trial, which was denied on September 4, 2002 (L.F. 353-375). Mr. Norton appealed on September 11 (L.F. 376-379).

POINTS RELIED ON

I.

The probate court erred when it committed Mr. Norton to secure confinement without first considering or allowing consideration of less restrictive alternatives, in violation of Mr. Norton's right to Equal Protection of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that similarly situated persons must be treated similarly and persons involuntarily committed to the Department of Mental Health other than sexually violent predators are entitled to custody and treatment in the least restrictive environment.

Baxstrom v. Herold, 86 S.Ct. 760, 763 (1966);

Detention of Brooks, 36 P.3d 1034, 1040 (Wash. 2001);

Ex parte Wilson, 48 S.W.2d 919, 921 (Mo. banc 1932);

In re Young, 857 P.2d 989 (Wash. 1993);

United States Constitution, Fifth and Fourteenth Amendments;

Missouri Constitution, Article I, Section 2;

Section 552.040, RSMo 2000;

Section 556.061, RSMo 2000;

Section 630.115, RSMo 2000;

Section 632.300, RSMo 2000;

Section 632.355, RSMo 2000;

Section 632.365, RSMo 2000; and

Section 632.495, RSMo 2000.

II.

The probate court erred in denying Mr. Norton's motion to dismiss the petition filed against him, and in entering a judgment committing Mr. Norton to secure confinement in the Department of Mental Health because Section 632.483 RSMo does not require an examination by a psychiatrist or psychologist before the State may file a petition for civil commitment against a person confined in the Department of Corrections while Section 632.484 RSMo imposes such a requirement before a petition may be filed against a person not confined in DOC, and therefore violates Mr. Norton's right to Equal Protection of the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that the statutes treat similarly situated persons differently.

***Etling v. Westport Heating and Cooling Services, Inc*.,** 925 S.W.3d 771 (Mo. banc 2003);

Baxstrom v. Herold, 86 S. Ct. 760 (1966);

United State Constitution, Fifth and Fourteenth Amendments;

Missouri Constitution, Article I, Section 2; and

Sections 632.483, .484, .486, .489, .492, RSMo 2000.

III.

The probate court erred in denying Mr. Norton's motion to exclude statements he made during the End of Confinement report prepared pursuant to Section 632.483, RSMo because he was not advised of his right to counsel and to consult with counsel before making any statements, in violation of Mr. Norton's right to due process of the law as guaranteed by the Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution. Alternatively, if Mr. Norton is not provided counsel for the interview pursuant to Section 632.483, RSMo, he is treated differently from other persons being interviewed and evaluated for involuntary civil commitment and are provided counsel pursuant to Sections 632.320 and 632.325, RSMo, 2000, thereby denying Mr. Norton Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution.

Missouri Osteopathic Foundation v. Ott, 702 S.W.2d 495 (Mo. App., W.D. 1985);

Vitek v. Jones, 100 S.Ct. 1254 (1980);

Baxstrom v. Herold, 86 S.Ct. 760 (1966);

Ex parte Wilson, 48 S.W.2d 919 (Mo. Banc 1932);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 2; and

Sections 632.300, .320, .325, .483, RSMo 2000.

ARGUMENT

I.

The probate court erred when it committed Mr. Norton to secure confinement without first considering or allowing consideration of less restrictive alternatives, in violation of Mr. Norton's right to Equal Protection of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that similarly situated persons must be treated similarly and persons involuntarily committed to the Department of Mental Health other than sexually violent predators are entitled to custody and treatment in the least restrictive environment.

After the jurors returned their verdict that Mr. Norton should be committed to the Department of Mental Health for control, care, and treatment, Mr. Norton objected to formal entry of judgment without consideration by the probate court of less restrictive alternatives to secure confinement (Tr. 823-824). The State responded that there is no statutory provision for less than secure confinement (Tr. 824). The probate court overruled Mr. Norton's objection and entered a judgment committing Mr. Norton to secure confinement in DMH (L.F. 19, Tr. 824).

Section 632.495, RSMo 2000, provides that a person determined to be a sexually violent predator is committed to the custody of the Department of Mental Health for control, care and treatment. That section further demands: "At all

times, persons committed for control, care and treatment by the department of mental health pursuant to sections 632.480 to 632.513 shall be kept in a secure facility designated by the director of the department of mental health and such persons shall be segregated at all times from any other patient under the supervision of the director of the department of mental health." ***Id***.

Chapter 632 sets out Missouri's Comprehensive Psychiatric Services. Persons other than those defined as "sexually violent predators" can be involuntarily civilly committed under that chapter if "as a result of a mental disorder, [the person] presents a likelihood of serious harm to himself or others." Section 632.300, RSMo 2000. If a person is found to present a likelihood of serious harm to himself or others as the result of a mental illness, the person is "detained for involuntary treatment in the least restrictive environment for a period not to exceed one year or for outpatient detention and treatment under the supervision of a mental health program in the least restrictive environment for a period not to exceed one hundred eighty days." Section 632.355, RSMo 2000. It is further required by Chapter 632: "Notwithstanding any other provision of the law to the contrary, whenever a court orders a person detained for involuntary treatment in a mental health program operated by the department, the order of detention shall be to the custody of the director of the department, who shall determine where detention and involuntary treatment shall take place in the least restrictive environment, be it an inpatient or outpatient setting." Section 632.365, RSMo 2000. Indeed, the Missouri legislature has granted certain entitlements to

persons in the custody of the Department of Mental Health, among them the right "[t]o be evaluated, treated or habilitated in the least restrictive environment." Section 630.115(11), RSMo 2000.

The same consideration of least restrictive alternatives to secure confinement is contained in Chapter 552 relating to persons found not guilty of a crime by reason of a mental disease or defect. When a criminal defendant is tried and acquitted on the basis of a mental disease or defect excluding responsibility, the defendant is ordered into the custody of the director of the Department of Mental Health. Section 552.040.2, RSMo 2000. Except for persons charged with dangerous felonies as defined by Section 556.061, murder in the first degree, or sexual assault, the defendant may be permitted immediate conditional release from custody of the director. ***Id***. In all circumstances, any person found not guilty by reason of a mental disease or defect can ultimately be considered for care, control and treatment outside of a secure facility:

> Notwithstanding section 630.115, RSMo any person committed pursuant to subsection 2 of this section shall be kept in a secure facility until such time as a court of competent jurisdiction enters an order granting a conditional or unconditional release to a nonsecure facility.

Section 552.040.4.

All of these statutes deal with persons committed to the Department of Mental Health due to a mental condition. Persons with a mental disorder rendering them dangerous to themselves or others and criminal defendants found

not guilty due to a mental disease or defect excluding responsibility are permitted by statute to be confined, cared for, and treated in the least restrictive environment appropriate. But to the contrary, persons with a mental abnormality "affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others," Section 632.480(2), can only be confined, cared for, and treated in a secure facility. No less restrictive alternative is permitted by Section 632.495.

In deciding whether a statute violates equal protection, this Court must decide whether the classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. ***Etling v. Westport Heating and Cooling Services, Inc.***, 92 S.W.3d 771, 774-775 (Mo. banc 2003). If so, the classification is subject to strict scrutiny and the Court must determine whether it is necessary to accomplish a compelling state interest. ***Id***. If the statute does not impinge on a suspect class or fundamental constitutional right, review is limited to whether the classification is rationally related to a legitimate state interest. ***Id***. Sexually violent predators do not constitute a suspect class for equal protection analysis. ***State ex rel. Nixon v. Askeren***, 27 S.W.3d 834, 842 (Mo. App., W.D. 2000). But freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." ***Foucha v. Louisiana***, 112 S.Ct. 1780, 1785 (1992). Certainly, that freedom is not absolute, ***Kansas v. Hendricks***, 117 S.Ct. 2072, 2079 (1997), but because commitment under the SVP law

deprives Mr. Norton of his liberty interest, the classification impinges upon a fundamental right explicitly protected by the Constitution. The State must demonstrate that the deprivation of Mr. Norton's liberty interest is necessary to accomplish a compelling state interest. It cannot do so.

Equal protection does not require that all persons be dealt with identically, but does require that a distinction made has some relevance to the purpose for which the classification is made. ***Baxstrom v. Herold***, 86 S.Ct. 760, 763 (1966). And certainly, a legislature is free to recognize degrees of harm and may confine its restrictions to those classes where the need is deemed the clearest. ***State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County***, 60 S.Ct. 523, 526 (1940). But, "[e]qual protection of the law means equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place or under like circumstances." ***Ex parte Wilson***, 48 S.W.2d 919, 921 (Mo. banc 1932). The statute in ***Pearson*** distinguished for special treatment those persons who by habitual course of misconduct in sexual matters had evidenced an utter lack of power to control their sexual impulses from all persons guilty of sexual misconduct or having strong sexual tendencies. ***Id***. 525-526. Mr. Norton has been denied equal protection because he is treated differently under Section 632.495 from other persons rendered dangerous by a mental disorder; persons or a class of persons in the same place and under like circumstances as he.

It is certainly true that Section 632.480 defines a sexually violent predator in reference to the need for secure confinement. The jurors are instructed in that fashion (L.F. 321). But review of the developments in the sexually violent predator laws of the State of Washington demonstrate that such a statutory definition will not trump the constitutional requirement of equal protection.

The Supreme Court of the State of Washington found an equal protection violation in the failure of that state's SVP statute to provide care and treatment in the least restrictive environment appropriate, a requirement of its general civil commitment law. ***In re Young***, 857 P.2d 989 (Wash. 1993). The Washington statutes were very similar to those in Missouri. Washington defined a SVP as a person "who has been convicted of or charged with a crime of sexual violence and who suffers a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." ***Id***. at 993. A mental abnormality is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts." ***Id***. A person found to be an SVP under the Washington statutes is committed to a facility for control, care and treatment until the person is safe to be at large, and limits the treatment centers to which a person is committed to mental health facilities located within correctional institutions. ***Id***.

This limitation was inconsistent with the Washington statutes controlling general involuntary civil commitments which required consideration of less restrictive alternatives as a precursor to confinement. 857 P.2d at 1012. The

Washington Supreme Court held, "The State cannot provide different procedural protections for those confined under the sex predator statute unless there is a valid reason for doing so." ***Id***. The Court found no justification for considering less restrictive alternatives under the general commitment statutes, but not considering them under the SVP commitment statutes. ***Id***. The Washington Supreme Court explained the basis for its judgment:

> Not all sex predators present the same level of danger, nor do they require identical treatment conditions. Similar to those committed under RCW 71.05 [the general civil commitment statute], it is necessary to account for these differences by considering alternatives to total confinement. We therefore hold that equal protection requires the State to comply with the provisions of RCW 71.05 as related to the consideration of less restrictive alternatives.

Id.

By the same token, equal protection requires application of Section 632.365, "[n]otwithstanding any other provision of the law to the contrary, whenever a court orders a person detained for involuntary treatment in a mental health program operated by the department [of mental health], the order of detention shall be to the custody of the director of the department, who shall determine where detention and involuntary treatment shall take place in the least restrictive environment, be it an inpatient or outpatient setting," and Section 630.115, "[e]ach patient, resident or client shall be entitled to the following

without limitation: [t]o be evaluated, treated or habilitated in the least restrictive environment," to persons committed under Section 632.495.

Missouri defines a "sexually violent predator" as any person who suffers a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence *if not confined in a secure facility*. Section 632.480(5). This may suggest the legislature's recognition of a special degree of harm justifying different treatment. ***State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County***, ***supra***. This language was not contained in the statute considered by the Washington Supreme Court in ***Young***.

But the Washington legislature added that exact language to its statute in response to the decision in ***Young***. *See* ***Detention of Ross***, 6 P.3d 625, 628 (Wash. App., 2000). The respondent in ***Ross*** was not allowed to present evidence that care, control and treatment could be provided to him in a less restrictive alternative to secure confinement. ***Id***. The State argued on appeal that the new language of the statute, "if not confined in a secure facility" precluded admission of that evidence. ***Id***. at 629. The Washington appellate court disagreed. Because the State was required to establish that the respondent was more likely than not to reoffend if not confined in a secure facility, he was entitled to present evidence to rebut the necessity of secure confinement. ***Id***.

The Washington legislature again responded by amending the statute to allow a person committed as a sexually violent predator to present evidence of a less restrictive alternative only at an annual release hearing following

commitment, but not at trial. ***Detention of Brooks***, 36 P.3d 1034, 1040 (Wash. 2001). The Washington Supreme Court re-affirmed its holding in ***Young*** that "persons confined under chapter 71.05 RCW and chapter 71.09 RCW are similarly situated with respect to the legitimate purposes of the laws." ***Id***. at 1042. The Court accepted the State's argument that there were good reasons for treating SVPs differently from mentally ill persons because SVP are generally more dangerous. ***Id***. But the Court also found that there was no rational basis to permit SVPs to present evidence of less restrictive alternatives only at annual reviews, and not at trial for the jurors' consideration whether the person was even an SVP at all. ***Id***. at 1043-1044. The Washington Supreme Court held, "As we did in *Young* when we found an equal protection violation, we remand [the] cases for new commitment trials at which LRAs to confinement may be considered." ***Id***. at 1044.

The Washington statutes were modified to define a sexually violent predator as a person requiring secure confinement, which in turn required the jurors to find that secure confinement was necessary to return a verdict against the respondent. Thus the definition of a sexually violent predator and the burden on the jurors is he same under the Washington and Missouri statutes. Regardless of the definition or finding of the jurors, the Washington cases make it clear that the equal protection clause nonetheless requires consideration of less restrictive alternatives in the commitment following the jury's verdict.

There is no compelling state interest which allows the Missouri statutes to permit less restrictive alternatives to persons involuntarily committed on the basis of "a mental disorder [that] presents a likelihood of serious harm to himself or others," but denies that consideration to persons with a mental abnormality "constituting … a menace to the health and safety of others." The failure of the probate court to consider or to enter a judgment of confinement allowing consideration of less restrictive alternatives to secure confinement violates equal protection of the laws. The judgment must be reversed and a new judgment entered considering, or permitting consideration, of confinement less restrictive than secure confinement.

II.

The probate court erred in denying Mr. Norton's motion to dismiss the petition filed against him, and in entering a judgment committing Mr. Norton to secure confinement in the Department of Mental Health because Section 632.483 RSMo does not require an examination by a psychiatrist or psychologist before the State may file a petition for civil commitment against a person confined in the Department of Corrections while Section 632.484 RSMo imposes such a requirement before a petition may be filed against a person not confined in DOC, and therefore violates Mr. Norton's right to Equal Protection of the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that the statutes treat similarly situated persons differently.

Mr. Norton was confined in the Department of Corrections when the State initiated the procedure to declare him a sexually violent predatory and commit him to secure confinement in the Department of Mental Health (L.F. 20-23). The procedure was therefore initiated pursuant to Section 632.483, RSMo 2000. Under that section, someone from DOC prepares an End of Confinement report assessing whether the person "may meet the criteria of a sexually violent predator. In Mr. Norton's case, that person was Linda Kelley, a licensed clinical social worker (L.F. 25-33). That information is conveyed to the Office of the Attorney

General and the Multidisciplinary Team established to assess and advise the Attorney General whether or not the person meets the definition of a sexually violent predator. Section 632.483.1, .4. But the statute goes further. The case is then submitted to a prosecutor's review committee of five prosecuting attorneys who also "shall make a determination of whether or not the person" meets the definition. Section 632.483.5. "When it appears that the person presently confined may be a sexually violent predator and the prosecutor's review committee … has determined by a majority vote, that the person meets the definition of a sexually violent predator, the attorney general may file a petition" in the probate court alleging that the person is a sexually violent predator. Section 632.486.

There is another procedure by which a petition may be filed in the probate court alleging that a person is a sexually violent predator. Section 632.484, RSMo 2000, makes the process applicable to persons not confined in the Department of Corrections or other identified "agency" of the government. When the Attorney General receives written notice from a law enforcement agency that a person "who is not presently in the physical custody of an agency with jurisdiction," has committed an overt act (an act that creates a reasonable apprehension of harm of sexually violent nature), the attorney general may file a petition alleging that the person may meet the definition of a sexually violent predator in the probate court for detention and evaluation. Section 632.484.1. If the court determines that the person may meet the definition of an SVP, the person is detained for an evaluation

by DMH. Section 632.484.2. Once detained, "the department of mental health shall, through either a psychiatrist or psychologist as defined in section 632.005, make a determination whether or not the person meets the definition of a sexually violent predator." Section 632.484.3. "If the department determines that the person may meet the definition of a sexually violent predator, the attorney general shall provide the results of the investigation and evaluation to the prosecutor's review committee." Section 632.484.4. If the prosecutor's review committee determines that the person meets the definition of a sexually violent predator, it provides notice of that finding to the Attorney General. ***Id***. Then, "[t]he attorney general may file a petition pursuant to section 632.486…." ***Id***.

Once a petition is filed pursuant to Section 632.486 the probate court must decide whether there is probable cause to believe that the respondent may meet the definition of a sexually violent predator. Section 632.489, RSMo 2000. If the court finds probable cause, the respondent is detained for an evaluation by a psychiatrist or psychologist as defined in Section 632.005. Section 632.489.4. The matter then proceeds to trial. Section 632.492, RSMo 2000.

Mr. Norton filed a motion to dismiss the petition or to declare Section 632.483 unconstitutional on its face or as applied because he was denied, only because he was confined at the time, an initial determination by a psychologist or psychiatrist that he may be a sexually violent predator before the Attorney General is authorized to file a commitment petition (L.F. 228-236). He pointed out that if he had not been in custody a determination by a psychologist or psychiatrist that

he may be a sexually violent predator would have been required by Section 632.484 before the Attorney General could file a commitment petition (L.F. 228-236).

The probate court denied Mr. Norton's motion, finding that it was not necessary to produce the testimony of a psychologist or psychiatrist to establish the probable cause necessary under Section 632.486, RSMo 2000 (L.F. 269-271).

While Mr. Norton's motion sought dismissal of the petition because "there is no requirement for psychological or psychiatric testimony when determining probable cause," he did argue within the body of the motion that "if the department of mental health does not find [under section 632.484] that the person may meet the definition of a sexually violent predator, then the attorney general has absolutely no authority or jurisdiction to give notice to the prosecutor's review committee, and ultimately has no authority or jurisdiction to file a petition." (L.F. 228, 231). He pointed out how he was denied equal protection under the statutes: "If Mr. Norton had been on parole, or had been released from his prison term, the attorney general would not have had the ability to file this petition." (L.F. 231). Mr. Norton believes that he has adequately raised an equal protection violation not only in the competency of the testimony at the probable cause hearing, but also to the different treatment provided by Sections 632.483 and 632.484 prior to the filing of a petition and determination of probable cause.

As noted in Point I, supra., in deciding whether a statute violates equal protection, this Court must decide whether the classification operates to the

disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. ***Etling v. Westport Heating and Cooling Services, Inc.***, 92 S.W.3d 771, 774-775 (Mo. banc 2003). If so, the classification is subject to strict scrutiny and the Court must determine whether it is necessary to accomplish a compelling state interest. ***Id***. If the statute does not impinge on a suspect class or fundamental constitutional right, review is limited to whether the classification is rationally related to a legitimate state interest. ***Id***. Mr. Norton argued that the United States Supreme Court decision in ***Baxstrom v. Herold***, 86 S.Ct. 760 (1966), supported his argument. The appellant in ***Baxtrom*** was determined to be "insane" while incarcerated in prison, and transferred to a prison hospital for the mentally ill. ***Id***. at 761-762. As he neared the end of his term, the State committed Baxstrom to the Department of Mental Hygiene pursuant to a statute which allowed civil commitment at the expiration of the penal term. ***Id***. at 762. Under this statute, the question of sanity is determined by a court after a hearing. ***Id***. at 761-762.

But other persons found to be subject to civil commitment for insanity by a judge under the New York law are entitled to a review of that determination by a jury. ***Id***. at 762. The United States Supreme Court concluded that the absence of jury review denied persons committed at the end of a penal sentence equal protection of the law given to others civilly committed. ***Id***. at 762-763. The Court rejected the State's argument that it had drawn a reasonable classification differentiating the civilly insane from the criminally insane. ***Id***. at 763. Equal

protection does not require that all persons be treated equally, but does require that a distinction have some relevance to the purpose for which the classification is made. ***Id***. The Court held that the classification of mentally ill persons as either insane or dangerously insane may be a reasonable distinction for purposes of the type of custody and care to be given, "but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*." ***Id***. (emphasis in original).

The probate court agreed with Mr. Norton that the distinctions between Section 632.483 and .484 were "significant," and "worked in a very substantial way to [his] detriment…." (L.F. 271). But the court went on to distinguish Mr. Norton's situation from that in ***Baxstrom*** because Mr. Norton was not denied the opportunity to a jury trial (L.F. 271).

Mr. Norton believes that this is too narrow a view of the holding of ***Baxstrom***. It is certainly true that if probable cause is found in Section 632.489 Mr. Norton will nonetheless have the opportunity for a jury trial under Section 632.492 to make the ultimate decision whether he has a mental abnormality as defined by statute. But what the probate court failed to give sufficient consideration is that the requirements of either Section 632.483 or 632.484 *must be met before* the Attorney General acquires authority to file a commitment petition. As in ***Baxstrom***, the requirements of Sections 632.483 or 632.484 must be met before the State can seek a determination of whether Mr. Norton has a

mental abnormality *at all*. The principle of equal protection violated in ***Baxstrom*** is the same as for Mr. Norton.

Because Mr. Norton was incarcerated he was not examined by a psychologist or psychiatrist before the State was authorized to file the commitment petition. Section 632.483. A person not incarcerated would be examined by a psychologist or psychiatrist before the State would have the authority to file a commitment petition. Section 632.484. Ms. Kelley, a licensed clinical social worker not a psychologist or psychiatrist, opined that Mr. Norton might meet the definition of a sexually violent predator. After the petition was filed and the probate court found probable cause, Dr. Rabun, a psychiatrist with the Department of Mental Health, concluded that Mr. Norton did not have a mental abnormality necessary to meet the definition of a sexually violent predator (L.F. 201).

The State was able to proceed to the jury trial on the opinion of a retained private out-of-state psychiatrist in spite of Dr. Rabun's conclusion because the petition had already been filed and probable cause found. But if Mr. Norton had not been incarcerated the conclusion of a psychologist or psychologist of the Department of Mental Health – such as Dr. Rabun – that he had a mental abnormality would have been necessary *before* the petition could have been filed in the first place. Because a psychiatrist with the Department of Mental Health did not find that Mr. Norton may meet the definition of a sexually violent predator, the State could not have filed a commitment petition. Sections 632.484.4, 632.486.

Mr. Norton was made to stand trial, and ultimately to suffer indefinite involuntary commitment, under circumstances that would not have subjected a person not incarcerated to the same fate. He was denied equal protection of the law.

Because Section 632.483 denied Mr. Norton equal protection of the law, the probate court erred in not dismissing the petition, the judgment and commitment order must be reversed, and Mr. Norton must be released from the commitment to a secure facility in the custody of the Department of Mental Health.

III.

The probate court erred in denying Mr. Norton's motion to exclude statements he made during the End of Confinement report prepared pursuant to Section 632.483, RSMo because he was not advised of his right to counsel and to consult with counsel before making any statements, in violation of Mr. Norton's right to due process of the law as guaranteed by the Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution. Alternatively, if Mr. Norton is not provided counsel for the interview pursuant to Section 632.483, RSMo 2000, he is treated differently from other persons being interviewed and evaluated for involuntary civil commitment and are provided counsel pursuant to Sections 632.320 and 632.325, RSMo, thereby denying Mr. Norton Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution.

Linda Kelley, a clinical social worker, interviewed Mr. Norton for an End of Confinement report to determine whether he might meet the statutory criteria for a sexually violent predator (Tr. 427-428, 429-431, 434). Such a report is done for any inmate with an index offense who fails to "successfully" complete MOSOP while incarcerated (Tr. 429-431). Thus, the End of Confinement report is

performed pursuant to Section 632.483.1, RSMo 2000, "[w]hen it appears that a person may meet the criteria of a sexually violent predator."

Ms. Kelley asked Mr. Norton about the offense for which he was committed (Tr. 438-439). She also asked Mr. Norton about the other child present at the time of that offense (Tr. 440). Ms. Kelley further asked Mr. Norton if there were "other victims" (Tr. 441). Mr. Norton told Ms. Kelley about a fifteen year old girl and a sixteen year old girl (Tr. 441-443). Ms. Kelley also asked Mr. Norton about his "sexual fantasies," because sometimes people will act out those fantasies (Tr. 443). Mr. Norton described incidents of rape he observed when he worked at various carnivals, and about a strip club where twelve year old virgins were raped by patrons (Tr. 445-448). Ms. Kelley "confirmed" that Mr. Norton fantasized about these events (Tr. 448-449). Dr. Hoberman used these statements to conclude that Mr. Norton fit the criteria of a sexually violent predator (Tr. 504, 506, 515-516, 550-551).

Mr. Norton filed a motion to exclude those statements because he had not be advised of his right to counsel or his right to consult with counsel prior to answering questions (L.F. 66-72). Ms. Kelley testified that she advised Mr. Norton that the interview was not confidential and could be used to determine whether he was a sexually violent predator (Tr. 436). She also testified that she advised Mr. Norton that he could leave the interview any time he wanted (Tr. 436). In her written End of Confinement report, Ms. Kelley noted that upon receiving such advice Mr. Norton responded "I don't have any counsel present."

(L.F. 26). Ms. Kelley wrote: "Evaluator acknowledged that he did not have counsel present and asked him did that mean he did not wish to participate in the interview." (L.F. 26). According to Ms. Kelley, Mr. Norton said that he wanted to participate in the interview and did so (L.F. 26). Mr. Norton argued in his motion to exclude the statements that other persons civilly committed pursuant to Chapter 632 are provided counsel immediately upon the person's initial contact under the commitment procedures, and are advised of that fact. The probate court denied Mr. Norton's motion (L.F. 157).

The State suggested in opposition to Mr. Norton's motion that because the proceeding is characterized as "civil," any right to counsel must be specifically provided by statute (L.F. 94). Be that as it may, "it is not the characterization of the proceedings which determines whether constitutional guarantees normally utilized only in criminal matters apply, but rather, what is at stake for the individual." ***In re Link***, 713 S.W.2d 487, 494 (Mo. banc 1986). At stake for Mr. Norton was indefinite deprivation of his liberty. The State suggested that counsel is not provided in a sexually violent predator proceeding until the probable cause hearing stage, and thereafter at the trial and again at annual review hearings (L.F. 94-95). Mr. Norton suggests that this argument is incorrect. It is certainly true that the first time the right to counsel in a sexually violent predator proceeding is specifically discussed is in Section 632.489.3(1), RSMo 2000. But the State's suggestion overlooks the language contained in Section 632.492, RSMo 2000. That section describes the conduct of a trial, but it also provides: "At all stages of

the proceedings pursuant to sections 632.480 to 632.513, any person subject to sections 632.480 to 632.513 shall be entitled to assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person." Section 632.492.

"[A]n unambiguous statute [is taken] to mean what it says, because the legislature is presumed to have intended what a statute says." ***Missouri Osteopathic Foundation v. Ott***, 702 S.W.2d 495, 497 (Mo. App., W.D. 1985). The Missouri legislature unambiguously stated that *at all stages of the proceedings pursuant to sections 632.480 to 632.513, any person subject to sections 632.480 to 632.513 shall be entitled to assistance of counsel*. Mr. Norton became subject to Section 632.483 when Ms. Kelley and the Department of Corrections identified him as "a person [who] may meet the criteria of a sexually violent predator" and subjected him to an interview as part of the End of Confinement report proceeding. Section 632.483. For those who can't count, Section 632.483 is within "sections 632.480 to 632.513." Contrary to the State's suggestion, Mr. Norton was entitled to counsel at the End of Confinement interview.

State statutes can create interests that are entitled to procedural due process protection under the Fourteenth Amendment, ***Vitek v. Jones***, 100 S.Ct. 1254 (1980). While one may not have a "constitutional or inherent right" to a particular interest, once a state has afforded the opportunity for that interest, due process protections must be invoked to ensure that the state-created right is not arbitrarily

denied or abrogated. ***Greenholtz v. Nebraska Penal Inmates***, 99 S.Ct. 2100 (1979); ***Morrissey v. Brewer***, 92 S.Ct. 2593 (1972); ***Wolff v. McDonnell***, 94 S.Ct. 2963 (1974). The legislature provided in Section 632.492 the right to counsel in proceedings pursuant to Section 632.483. When Mr. Norton noted that he was without counsel Ms. Kelley did not inform him of his right to counsel, but only asked if he meant that he did not want to participate in the interview. Ms. Kelley did not advise Mr. Norton that he had the right to counsel to assist him in deciding whether he wanted to continue with the interview and risk providing evidence which would later be used against him in court. Mr. Norton's decision to continue with the interview amounts to an unknowing waiver of his statutory right to counsel and cannot be deemed to be voluntarily made. The appropriate remedy for this due process violation would have been the exclusion of the statements, and the probate court erred in not excluding them.

If the State's argument that Mr. Norton is not provided counsel until the probable cause stage of the proceedings is accepted, Mr. Norton is denied equal protection of the law. As noted previously, in deciding whether a statute violates equal protection, this Court must decide whether the classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. ***Etling v. Westport Heating and Cooling Services, Inc.***, 92 S.W.3d 771-774-775 (Mo. banc 2003). If so, the classification is subject to strict scrutiny and the Court must determine whether it is necessary to accomplish a compelling state interest. ***Id***. If the statute does not

impinge on a suspect class or fundamental constitutional right, review is limited to whether the classification is rationally related to a legitimate state interest. ***Id***.

Equal protection does not require that all persons be dealt with identically, but does require that a distinction made has some relevance to the purpose for which the classification is made. ***Baxstrom v. Herold***, 86 S.Ct. 760, 763 (1966). And certainly, a legislature is free to recognize degrees of harm and may confine its restrictions to those classes where the need is deemed the clearest. ***State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County***, 60 S.Ct. 523, 526 (1940). But, "[e]qual protection of the law means equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place or under like circumstances." ***Ex parte Wilson***, 48 S.W.2d 919, 921 (Mo. banc 1932). Mr. Norton has been denied equal protection because he is treated differently under Section 632.493 from other persons rendered dangerous by a mental disorder; persons or a class of persons in the same place and under like circumstances as he.

Other persons who are detained to determine whether they have a mental disorder rendering them dangerous to themselves or others are *immediately* entitled to counsel and to notice of that entitlement. Sections 632.300 to 632.325, RSMo 2000. Indeed, these persons must be notified of their right to counsel *within three hours* of the initial detention. Section 632.320. Mr. Norton believes that no rational basis can be shown to immediately provide counsel, notice of

counsel, and access to counsel to persons subject to civil commitment procedures pursuant to Sections 632.300 to 632.475, but not to persons subject to civil commitment procedures pursuant to Sections 632.480 to 632.513. Indeed, the State made no attempt to establish that the distinction was rationally related to a legitimate governmental purpose (L.F. 94-97). Mr. Norton recognizes that sexually violent predators have been considered to be more dangerous, as a class, than other persons rendered dangerous by a mental condition. ***Detention of Brooks,*** 36 P.3d 1034, 1040 (Wash. 2001). But that distinction has no rational basis to denying the person the right to assistance of counsel given to persons "less" dangerous. The only reason to deny the assistance of counsel to a person being evaluated for possible commitment as a sexually violent predator is to dupe the person into "confessing" or "admitting" facts which will make indefinite commitment easier and more likely to achieve. While this may be a purposeful distinction, it cannot be accepted as rational when the ultimate outcome of the State's petition is indefinite, involuntary commitment. If Mr. Norton is not provided counsel until the probable cause phase of the sexually violent predator process he has been denied equal protection of the law.

Because the probate court erred in not excluding statements Mr. Norton made during the End of Confinement interview, the judgment and commitment order of the probate court must be reversed and the cause remanded for a new trial. In the alternative, the judgment and order must be vacated and Mr. Norton

discharged from the commitment because Section 632 483 violates equal protection of the law.

CONCLUSION

Because the probate court failed to consider or to enter a judgment of confinement allowing consideration of less restrictive alternatives to secure confinement, as set out in Point I, the judgment and commitment order must be reversed and a new judgment entered considering, or permitting consideration, of confinement less restrictive than secure confinement. Because Section 632.483 denied Mr. Norton equal protection of the law, as set out in Point II, the probate court erred in not dismissing the petition, the judgment and commitment order must be reversed, and Mr. Norton must be released from the commitment to a secure facility in the custody of the Department of Mental Health. Because the probate court erred in not excluding statements Mr. Norton made during the End of Confinement interview, as set out in Point III, the judgment and commitment order of the probate court must be reversed and the cause remanded for a new trial. In the alternative, the judgment and order must be vacated and Mr. Norton discharged from the commitment because Section 632 483 violates equal protection of the law.

Respectfully submitted,

Emmett D. Queener, MOBar #30603
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855

Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06 and Local Rule 360. The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 12,314 words, which does not exceed the 15,500 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in June, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ___ day of June, 2003, to James R. Layton, 207 W. High Street, Jefferson City, MO 65101.

_____
Emmett D. Queener

APPENDIX

TABLE OF CONTENTS TO APPENDIX